

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

THOMAS E. BROWNSCOMBE,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.  
(CSA 2 881 825)

DOCKET NUMBER  
DC831L8710168

DATE: JUL 19 1988

Thomas E. Brownscombe, Adelphi, Maryland, pro se.

Jane C. Johnston, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant petitions for review of the initial decision, issued on May 8, 1987, that sustained OPM's denial of disability retirement benefits. For the reasons discussed in this Opinion and Order, the petition is DENIED because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and affirms the initial decision as MODIFIED by this Opinion and Order. The Office of Personnel Management's denial is SUSTAINED.

BACKGROUND

The appellant applied for a disability retirement annuity based on his cardiac arrhythmia, and on occasional episodes of atrial fibrillation, ventricular fibrillation and other cardiac irregularities. The Office of Personnel Management (OPM) disallowed the application and subsequently issued a reconsideration decision sustaining that action. It found that the appellant had not established that he was unable to render useful and efficient service because of injury or disease.

OPM found that the appellant had failed to substantiate the presence of any significant coronary disease that would render him disabled for the position of Economist. It noted that the employing agency had indefinitely suspended the appellant on March 5, 1985, shortly after he had applied for disability retirement, and that it had removed him on June 8, 1985, based on the appellant's conviction on a criminal charge. OPM considered that, although this situation might have resulted in some degree of anxiety and stress, the appellant had provided no documentation to show that his condition was exacerbated to the extent that it caused a service deficiency or warranted medical restriction from duty or the workplace.

On appeal, the administrative judge sustained the action based on the same medical evidence reviewed by OPM.

(The appellant presented no new medical evidence to the administrative judge.) He found that the medical reports failed to show any direct connection between the appellant's condition and his ability to perform the specific duties of his former position, and that there was no showing that the appellant's performance was less than satisfactory, that it was in any way deficient, or that his continuous absence from January 30, 1985, to the date of his removal was occasioned by his medical condition. (The administrative judge noted that the appellant's criminal conviction occurred on February 28, 1985.) He also found that the appellant's allegations regarding processing delays and alleged improprieties on the part of OPM and his employing agency, the Veterans Administration, were irrelevant to the issue of the appellant's entitlement to disability retirement benefits.

In his petition for review,<sup>1</sup> the appellant alleges that errors on the part of the administrative judge affected his substantive rights. He claims that the administrative judge improperly denied him discovery and witnesses, erred in finding that his allegations of retaliation for whistleblowing were irrelevant to the disability retirement

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<sup>1</sup> The appellant has submitted a supplement to his petition for review in which he raises additional issues related to those brought up in his original submission. The Board's regulations do not provide for submission of pleadings beyond the petition for review and a response. Thus, we do not address the arguments presented in the supplement.

proceeding, and erred in allowing OPM to introduce the prejudicial and irrelevant issue of his criminal conviction.<sup>2</sup>

### ANALYSIS

The administrative judge did not abuse his discretion in denying the appellant's request that the employing agency produce certain information, including his job description and a definition of the critical elements of his position.

The record shows that the appellant was aware of the major duties of his position. In answering question 8 of OPM's interrogatories, "What specific duties of your job do you contend you are prevented from performing because of the medical condition(s) or symptoms named in question 1," the appellant states: "The particular duties which comprised a

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<sup>2</sup>In his petition, the appellant mentions that more than six months after he filed his first disability retirement application, he learned that OPM did not have it. He then submitted a second one, but allegedly was unable to provide the original medical documentation. The appellant seems to be arguing that he was harmed by OPM's delay because it denied him the opportunity to have certain medical evidence considered.

Although, in the case he made to the administrative judge, the appellant identified the delay in processing his application, he did not present evidence or argument of harm, from this delay, to his ability to present medical evidence. Further, he did not allege in his petition for review that he has new and material evidence with respect to it. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite a party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).

large part of appellant's job and which specifically cannot be accomplished now are the data processing duties." Appeal File, Tab 9. He did not allege that he was unaware of the duties of his position and therefore did not establish that the information he sought through discovery would have benefitted him. *Cf. Abbott v. United States Postal Service*, 27 M.S.P.R. 442, 444 (1985) (in determining whether an interrogatory is so broad as to be burdensome, the Board balances the burden on the interrogated party against the benefit the information would provide to the party submitting the interrogatory).

In any event, the employing agency, the Veterans Administration, is not a party to this appeal and, thus, cannot be sanctioned under 5 C.F.R. §§ 1201.43 and 74(c) for failure to comply with an order compelling discovery. Further, while discovery can be compelled from a non-party Federal agency, 5 C.F.R. §§ 1201.73 and 74, the only available sanction for failure to comply is enforcement of a subpoena under 5 C.F.R. § 1201.85, and the appellant did not file a motion for issuance of a subpoena against the employing agency.

Generally, the administrative judge has wide discretion to control proceedings before him, including the authority to exclude testimony he believes would be irrelevant, immaterial, or repetitious. See *McGowan v. Veterans*

Administration, 30 M.S.P.R. 221, 224 (1986). In this case, the administrative judge did not err in denying the appellant's request that OPM officials who denied the appellant's retirement appeal testify. The appellant did not establish that their testimony would add anything to the information in the record. See *Farris v. Department of the Air Force*, 20 M.S.P.R. 547, 551 n.3 (1984). Also, the administrative judge did not err in denying the appellant's request for the testimony of his former supervisor despite OPM's not objecting to his appearance. The appellant failed to identify the substance of the supervisor's testimony. His speculation that his former supervisor would testify that the statement to OPM that he demonstrated no service deficiency was false or unsupported by the record. Additionally, the appellant made no attempt to secure the presence of this witness or his affidavit. Thus, the appellant did not show how this witness's absence impaired the proceedings or his rights. See *Moore v. Department of State*, 15 M.S.P.R. 488, 490 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985).

The appellant asserts that the employing agency retaliated against him for his allegations of misuse of computer software by refusing to place on OPM's disability retirement forms that he had a service deficiency. Since the record does not otherwise show a service deficiency, however, the appellant did not establish a basis for his

allegation that information about his whistleblowing activities was relevant to his disability retirement case. Thus, the administrative judge did not err in disallowing evidence of alleged retaliation for whistleblowing by the employing agency.

Finally, the administrative judge did not err in allowing OPM to refer to the appellant's criminal conviction, occurring on February 28, 1985. This evidence is relevant because it tends to show that the appellant's absence from January 30 to the date of his indefinite suspension was not caused primarily by his heart condition and that the absence therefore does not establish that the appellant was disabled.

We find that the appellant has failed to show error either with respect to the matters mentioned above, or in the administrative judge's finding that the appellant had failed to show that he was entitled to a disability retirement annuity.

#### ORDER

This is the Board's final order in this appeal. 5  
C.F.R. § 1201.113(c).

NOTICE TO APPELLANT


You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1)

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board